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DEC 6
JAMES H. McK

Brief of Lisle for D. C.

Filed Dec. 6, 1897.

201

Supreme Court of the United States.

JOHN Q. BROWN, ASSIGNEE AC. PLAINTIFF IN
ERROR,

VS.

THE KARION NATIONAL BANK OF LEBANON,
KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR.

W. J. LISLE, Attorney for Defendant in Error.

THE LEBANON NATIONAL BANK.

Supreme Court of the United States.

JOHN Q. BROWN, ASSIGNEE &C., PLAINTIFF IN
ERROR,

vs.

THE MARION NATIONAL BANK, OF LEBANON,
KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR.

This was an action by John Q. Brown, assignee of Lafe and E. B. Baxter, in the Marion Circuit Court, State of Kentucky, against the Marion National Bank to have enforced against Defendant in Error, the United States Statutes on the subject of usury charged and collected by the Defendant as a National Bank. Plaintiffs in Error were indebted to the Bank in some four notes bearing interest at the rate of 7 per cent. per annum or one per cent. more than the State note. Plaintiff sought to have judgment for double the interest actually paid on these notes at their sundry renewals, and to have declared forfeited not only the interest called for on the face of each,

but such interest items as had from time to time been added in the body of the notes on renewals.

The Court will notice the United States Statute sec. 5098 provides that the taking, reserving, or charging a rate of interest greater than the State rate only works a forfeiture of the interest "when such taking is knowingly done "

The Circuit Court of Kentucky adjudged Defendant in Error to pay Plaintiff double the amount of the interest actually paid during the two years next preceeding the institution of the suit, and also adjudged as forfeited all the interest the notes bore on their face, and this decision the Court of Appeals of Kentucky, on appeal by Plaintiff in Error, affirmed as correct and remanded the case to the Circuit Court for judgment in conformity to opinion of Court of Appeals See. 92. K. Rep. 612. On writ of error the case then came to this Honorable Court and was dismissed because there had been no final judgment that this Court could review. 146. U. S. 619, 620.

In the Marion Circuit Court of Kentucky on the second day of October, 1894, judgment was entered in conformity to the mandate of the Court of Appeals of Kentucky and from which judgment Plaintiff in Error again appealed to the State Court of Appeals and the judgment below was affirmed, and from this judgment of the State Court of Appeals this case is now here by writ of error.

This honorable Court in commenting on the U. S. Statutes relating to National Banks charging more than the State rate, says a forfeiture under its provision should not be declared unless the facts upon which it must rest are clearly established. The Court farther uses this language:

"And since the courts uniformly incline against the declaration of a forfeiture, the party seeking such declaration should show affirmatively the bank knowingly reserved usurious interest and should be held to make *convincing proof*

of every fact essential to forfeiture " Wheeler vs. Union National Bank Pittsburg 96 U. S. 268, 270. In Tiffany vs. National Bank state of Missouri, 85 U. S. 409, 413 says the Statute must receive a strict, that is, a literal construction.

In the case at bar the record shows Plaintiff in Error neither alleged, except by amendment to answer which Defendant was not summoned to answer, or proved that the charging of interest by Defendant in Error of a rate of interest greater than the state rate was *knowingly done*. Plaintiff in Error took the deposition of Mr. Knott, cashier of Defendant in Error, but wholly failed to prove by him that he, said cashier, knowingly charged more than the State rate of interest.

The record shows that on April 21, 1891, Plaintiff filed his original petition and interrogatories, paid state tax and had summons issued. On April 25, 1891, an amended petition was filed making the charge that the usurious charge was knowingly made. The record does not show any summons was ever issued on this amended petition. On June 10, 1891, the record shows Defendant in Error filed its answer to petition and answer to interrogatories. The record does not show the amended petition was filed in Court or in term time or was answer ever filed to it. There is nothing to show Defendant knew of this amendment or was required to respond to it. It was simply filed with the clerk.

The forfeiture provided for in the U. S. Statutes by the very terms of the Statute depends on the bank *knowingly charging* more interest than the State rate. This should be alleged and proven, and that beyond any reasonable question. Plaintiff's petition, which Def't alone was summoned to answer, does not make this charge nor does the proof any where show that the Def't bank at the time it made the interest charge did so knowing it was charging more than

the State rate. 10 per cent. was the legal rate of interest in Kentucky (when the contract said so) from March 14, 1871 to Sept. 1, 1876. 8 per cent. was the rate from Sept. 1, 1876 to April 1, 1878, and from that time 6 per cent. has been the legal rate. Plaintiffs gave the Baxters their first note to Defendant for \$4500 June 9, 1874, and from then on up until April 1, 1878, when 6 per cent. became the State rate Defendant on all the different renewals charged no more than the state rate.

From what we have stated we maintain the petition presented no cause of action. The amendment filed five days afterwards, but which Def't was never summoned to answer endeavors to cure petition by saying the charging of more than the State rate *was knowingly* done. No answer was filed to this amendment as Defendant was never summoned or legally before the court on this amendment. The answer that was filed does not show it responds to the amended petition but answers the original petition. The amended petition was intended to cure the defect named in the original petition. It is an elementary principle, and well settled in Kentucky, that a summons must issue on an amended petition presenting a cause of action where the original petition fails so to present it.

Cecil vs. Sowards, 10 Bush, 96. (Ky.)

Rutledge vs. Vanmeter, 8 Bush, 354. (Ky.)

Joyes vs. Hamilton, 10 Bush, 544. (Ky.)

L. C. & Lex. R. R. Co. vs. case 9 Bush, 728. (Ky.)

Besides, the Court will notice that the Plaintiff in Error seeks to go back some sixteen years to have forfeited interest incorporated in one of the notes, and on other notes, for the same purpose, to go back eight or ten years, covering renewals made each three or more each year. Reason, public policy and our Statutes provide a time behind which you can not go to investigate or sue for real or supposed wrongs. In cases involving usury by National

Banks interest paid over two years can not be recovered by the payor. During all the years until this suit was brought the bank had the interest in the body of the notes, holding and using as its own property, adversely to the world and with the knowledge and consent of the Baxters, Lefe and Ed. By the Ky. Stats., Sec. 2515, an action upon a liability created by Statute, an action for a penalty or forfeiture, an action for withholding or detaining personal property, shall be commenced within five years next, after the cause of action accrued.

We suggest such a transaction as the one at bar is not criminal in itself, but only wrong because the Statute says so. It is not to the interest of the people for the courts to take up a severe penal Statute and enforce it at the instance of men who were themselves particeps in the transaction, and explore and open up transactions of many past years unless the law in the case presented imperatively demands it be done.

By Section 5198, U. S. Statutes, the courts can not go back in this case, as we suppose, more than two years prior to April 21, 1891, (the day Plaintiff in Error filed his petition in a State Circuit Court) as to interest actually paid, or charged or incorporated in renewals, as a renewal of principal and interest is in effect a payment and re-loan of interest. By the express terms of the Statute no usurious transaction as to interest paid more than two years before suit brought can be effected by such suit. Yet, Plaintiff seeks to go back some sixteen years and inquire through all those years into usurious transactions.

Even where no Statute of limitations directly governs the case courts act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands by refusing to interfere when there has been gross lack in prosecuting rights or long acquiescence in the assertion of adverse rights.

Wagner vs. Bird, 7 How. 234.

U. S. vs. Moore, 12 How. 209.

Badger vs. Badger, 2 Wall 87.

Godden vs. Kimmel, 9 U. S. 201.

We respectfully ask an affirmance of the judgment of the State Court.

W. J. LISLE,

Attorney for the Marion National Bank.